No. 06-1265

In the Supreme Court of the United States

KLEIN & CO. FUTURES, INC., PETITIONER

v.

BOARD OF TRADE OF THE CITY OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

TERRY ARBIT
Acting General Counsel
BRADFORD BERRY
Deputy General Counsel
HAROLD HARDMAN
Senior Assistant General Counsel
GLORIA CLEMENT
Assistant General Counsel
Commodity Futures Trading Commission
Washington, D.C. 20561

PAUL D. CLEMENT
Solicitor General
Counsel of Record
THOMAS G. HUNGAR
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner, a futures commission merchant and a clearing member of the New York Futures Exchange, is a proper plaintiff under 7 U.S.C. 25(b)(1) (1994), which established a private right of action for "a person who engaged in any transaction on or subject to the rules of [a] contract market or licensed board of trade."

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INTEREST OF THE UNITED STATES

The Commodity Futures Trading Commission (CFTC or Commission) is a federal agency created by Congress in 1974 to administer the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.* The question presented in the instant case concerns the CEA's express private right of action, see 7 U.S.C. 25, which was added to the statute in 1983. Private suits can provide a useful supplement to the CFTC's resolution of customer reparation complaints pursuant to 7 U.S.C. 18, thereby enhancing the Commission's ability to use its resources in an efficient manner. In addition, the proper application of Section 25 in this case turns on more general principles concerning the respective rights and obligations of various participants in the commodity futures trading industry. The United States therefore has a substantial interest in the proper inter-

pretation of Section 25 and its application to the circumstances of this case.

STATEMENT

1. Futures contracts in a variety of commodities are subject to extensive federal regulation under the CEA. Until 1982, the CEA did not expressly provide for private lawsuits. In *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982), however, this Court construed the CEA to establish an implied right of action. See *id.* at 374-388. Early the following year, the CEA was amended to add a new Section 22, codified at 7 U.S.C. 25, which expressly authorized private suits under specified circumstances. See Futures Trading Act of 1982, Pub. L. No. 97-444, § 235, 96 Stat. 2322.

The instant case involves the application of 7 U.S.C. 25(b)(1), which authorizes private suits against contract markets, clearing organizations, and boards of trade. In May 2000, at the time of the events that are alleged to give rise to liability in this case, Section 25(b)(1) provided as follows:

> (b) Liabilities of organizations and individuals; bad faith requirement; exclusive remedy
>
> (1)(A) A contract market or clearing organization of a contract market that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by section 7a(8) and section 7a(9) of this title, (B) a licensed board of trade that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by the Commission, or (C) any contract market, clearing organization of a contract market, or licensed board of trade that in enforcing any such bylaw, rule, regulation, or resolution violates this chapter or any Commission rule, regulation, or order, shall be liable for actual damages sustained by a person who engaged in any transaction on or subject to

> the rules of such contract market or licensed board of trade to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaws, rules, regulations, or resolutions.

7 U.S.C. 25(b)(1) (1994) (footnotes omitted).[1]

2. a. In May 2000, petitioner was a futures commission merchant (FCM). Pet. App. 2a, 4a-5a. The CEA defines the term "futures commission merchant" to mean an individual or other entity that "is engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market," 7 U.S.C. 1a(20)(A), and that accepts money or property to secure such orders, 7 U.S.C. 1a(20)(B). An FCM must be registered with the CFTC. 7 U.S.C. 6d(a)(1).

In May 2000, respondents New York Futures Exchange (NYFE) and New York Cotton Exchange (NYCE) were both boards of trade designated as contract markets by the CFTC

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[1] Because the question presented in the instant case concerns the range of plaintiffs that may pursue a private right of action under the CEA, that question is appropriately resolved under the law in effect at the time of the events that are alleged to give rise to liability. Cf. *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 946-951 (1997). As amended in December 2000, see Commodity Futures Modernization Act of 2000 (CFMA), Pub. L. No. 106-554, App. E, § 123(a)(25)(B)(i)(I) and (III), 114 Stat. 2763A-410 and 2763A-411 (7 U.S.C. 25(b)(1)), Section 25(b)(1) currently provides that a "registered entity" may be liable to "a person who engaged in any transaction on or subject to the rules of such registered entity." The term "registered entity" is defined under current law to include, *inter alia*, a "board of trade designated as a contract market," 7 U.S.C. 1a(29)(A), and a "derivatives clearing organization," 7 U.S.C. 1a(29)(C). The latter term is in turn defined to mean "a clearinghouse, clearing association, clearing corporation, or similar entity, facility, system, or organization." 7 U.S.C. 1a(9)(A). The December 2000 law described the changes to 7 U.S.C. 25(b)(1) as "TECHNICAL AND CONFORMING AMENDMENTS." CFMA § 123, 114 Stat. 2763A-405.

pursuant to 7 U.S.C. 7 (1994) and were both among the subsidiaries of respondent Board of Trade of the City of New York (NYBOT).[2] See Pet. App. 18a & n.3. Respondent New York Clearing Corporation (NYCC), a subsidiary of NYCE (and thus an indirect subsidiary of NYBOT), acted as clearing organization for the NYBOT futures exchanges, including NYFE and NYCE.[3] See *New York Futures Exch., Inc.*, CFTC Docket No. 01-13, 2001 WL 777042, at *2 (July 11, 2001) (*N.Y. Futures Exch.*). In its role as an FCM, petitioner served as an intermediary for its customers who traded on futures exchanges within the NYBOT. Pet. App. 3a. In some instances, FCMs may also trade "on their own accounts"—*i.e.*, they may enter into futures transactions as investments for themselves rather than on behalf of customers. See 17 C.F.R. 1.3(k) and (y).[4]

Petitioner was a "clearing member" of the NYCC, see Pet. App. 2a, and was therefore authorized to "clear with the

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[2] In August 2003, all contracts listed for trading on the NYFE were transferred to the NYCE. In June 2004, the NYCE and another subsidiary were merged with and into the NYBOT, with the NYBOT being the sole surviving exchange. The NYBOT and the IntercontinentalExchange, Inc. (ICE) entered into a merger agreement on September 14, 2006. The merger was completed on January 12, 2007, at which time the NYBOT became a wholly-owned subsidiary of ICE.

[3] After the merger of the NYCE into the NYBOT, the NYCC became a wholly-owned subsidiary of NYBOT. Effective June 1, 2007, the NYCC's name was changed to ICE Clear US, Inc.

[4] An FCM must treat each customer's funds deposited with the FCM as the property of that customer, see 7 U.S.C. 6d(a)(2), and it therefore may not use one customer's money to satisfy obligations incurred by another customer, see 17 C.F.R. 1.22. An FCM is not required, however, to establish a separate account for each customer, but may instead create a single omnibus customer account. See 17 C.F.R. 1.20(c); *Lincolnwood Commodities, Inc. of Col.*, CFTC Docket No. 78-48, 1984 WL 48104, at *13 (Jan. 31, 1984). If an FCM also trades on its own account, it must establish a separate account for those "proprietary" trades. See *id.* at *10-*11; 17 C.F.R. 1.3(k) and (y).

[NYCC] Contracts effected on or subject to the rules of an Exchange," J.A. 94 (NYCC By-Law 1.1); see ICE Clear US, Inc. (ICE Clear US) By-Law 1.1.[5] In May 2000, the trading of futures contracts was typically done by "open outcry" on the floor of the exchange, with FCMs or their representatives on both sides of the transaction agreeing (generally through hand signals) on price and quantity. See S. Rep. No. 384, 97th Cong., 2d Sess. 187 (1982) (1982 Senate Report); *Leist* v. *Simplot*, 638 F.2d 283, 287 (2d Cir. 1980), aff'd *sub nom. Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982). Both sides would then report the trade to the clearinghouse, which matched the trades and resolved any discrepancies between the parties' reports. 1982 Senate Report 188. "As trades are matched and confirmed at the end of each trading session, the clearinghouse takes the opposite side of every transaction. It becomes the seller of all 'buys' and the buyer of all 'sells.'" *Ibid.*[6] The clearinghouse thus

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[5] Portions of the NYCC Rules and By-Laws that were in force in May 2000 are reproduced at J.A. 85-201. The current ICE Clear US Rules and By-Laws are the successors to those rules and by-laws. See notes 2-3, *supra*. In the experience of the CFTC, the NYCC and ICE Clear US Rules and By-Laws are typical of the rules and by-laws of clearinghouses generally insofar as they define the legal relationships between the parties to a trade in the futures markets—*i.e.*, the customers on each side of the trade, the clearing FCMs on each side of the trade, and the clearinghouse itself.

In May 2000, trading on the floor of the NYFE was governed by the NYFE Rules. The former NYFE Rules are reproduced in the New York Futures Exchange Guide (CCH). The current NYBOT Rules now govern trading on NYBOT, which is the successor to all the exchanges formerly under the NYBOT umbrella. The current rules and by-laws of both the NYBOT and ICE Clear US are available at *About NYBOT: Rulebooks* (visited July 17, 2007) <http://www.nybot.com/aboutNYBOT/rulebooks/indexRulebooks.htm>.

[6] Electronic trading currently accounts for at least 60% of all trading volume on United States futures exchanges. See *Conflicts of Interest in Self-Regulation and Self-Regulatory Organizations*, 71 Fed. Reg. 38,740 n.8 (2006). In the electronic environment, traders place orders on a terminal, which is directly

"assumes the legal responsibility for the opposite side of every transaction made on the contract market." *Ibid.*

Even when clearing FCMs enter into futures contracts on behalf of their customers rather than on their own accounts, "[c]learinghouses look to the funds and credit of clearing FCMs for satisfaction of trading obligations rather than to the actual floor broker, floor trader, or other customer." Division of Trading & Markets, CFTC, *Report on Lessons Learned from the Failure of Klein & Co. Futures, Inc.* 2 (July 2001) <http://www.cftc.gov/files/tm/tmklein_report071101.pdf> (*Lessons Learned*); see *id.* at 16 ("[A]n FCM is responsible for losses suffered in the customer accounts it carries."). That is a long-established feature of the commodity futures trading industry. As the CFTC explained more than 20 years ago, "clearing organizations * * * generally have as their direct customers FCMs, not the ultimate 'customers' who entered into the futures contracts and options positions for which the [FCM's] margin funds were posted." 50 Fed. Reg. 36,050 (1985); see *Leist*, 638 F.2d at 287 ("The clearinghouse treats FCM's as principals in trading transactions."); *CFTC Interpretative Statement No. 85-3*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,703, at 30,987 (Off. Gen. Counsel Aug. 12, 1985).

At the conclusion of the clearing process, the clearing FCM on each side of the transaction has contractual rights and obligations vis-a-vis the clearinghouse, as well as a separate contractual relationship with that FCM's customer. See ICE Clear US Rule 401(a) (explaining that the clearinghouse, "by accepting a Contract offered to it for clearance by or on

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connected to the electronic market, rather than executing trades via open outcry on an exchange floor. However, the legal relationships between the clearinghouse and its clearing members on the one hand, and between clearing members and their customers on the other, remain the same in the electronic trading environment as in the "open outcry" environment described in the text.

behalf of a Clearing Member, shall assume, in the place of each Clearing Member that is a party to such Contract, all liabilities and obligations imposed thereby to the Clearing Member that is the other party thereto"); NYFE Rule 306(i)(2), N.Y. Futures Exch. Guide (CCH) ¶ 2523, at 2517 (Apr. 2002) (NYFE Guide) (all trades must be submitted for clearing) (compare NYBOT Rule 4.03(f)); J.A. 173-174 (NYCC Rule 504(a)) (describing payment obligations between the clearinghouse and its clearing members resulting from each day's trading gains and losses). The customers themselves, however, are not in privity of contract either with the clearinghouse or with each other. See ICE Clear US Rule 401(b)(i) (explaining that the liabilities and obligations of the clearinghouse "shall extend only to clearing members," and that the clearinghouse "shall not have any liability or obligation arising out of or with respect to any contract to any customer of a clearing member"). Rather, the customer's contractual relationship is with the clearing FCM that is ultimately responsible to the clearinghouse for the customer's trades. See *Lessons Learned* 2.

b. Margin accounts serve as security for the performance by both FCMs and customers of payment obligations (to the clearinghouse and the FCM, respectively) that arise from losing positions. An FCM must deposit with each clearinghouse of which it is a member a sum sufficient to meet its margin requirement, generally computed in accordance with the Standard Portfolio Analysis of Risk (SPAN) system. See J.A. 170 (NYCC Rule 502(a)); *Lessons Learned* 3 n.6. The amount of the required margin is based on analysis of all customer and other positions "carried" by the FCM (*i.e.*, positions for which the FCM bears financial responsibility) with the clearinghouse, and it is intended to cover, at a confidence level of 95-99%, the maximum loss that the FCM could reasonably be expected to suffer on those positions during a sin-

gle trading day. See *id.* at 3 & nn.6-7, 4. At least once each day, the FCM pays to or collects from the clearinghouse the net losses or gains for that day on all positions that the FCM carries. See J.A. 173-174 (NYCC Rule 504(a)).

The FCM engages in a similar process with respect to each of its customers. "An FCM that carries customer positions is required to collect margin from the customer in an amount that is determined by the exchange on which the position is executed." *Lessons Learned* 3; see *Leist*, 638 F.2d at 287; NYFE Rule 703, NYFE Guide ¶ 5005, at 5012 (Sept. 2002) (compare NYBOT Rule 5.03). The exchange establishes minimum requirements for customer margins, leaving the FCM free to insist on higher levels of margin if it chooses. *Lessons Learned* 3. "An FCM will frequently require higher margin levels from customers that it believes expose the FCM to higher levels of financial risk." *Ibid.* At least once a day, the FCM credits the accounts of its customers whose positions gained value and debits the accounts of customers whose positions lost value. See *id.* at 4. If a customer's account falls below the minimum required balance, the FCM will demand additional margin and may liquidate the account if the additional margin is not forthcoming. See NYFE Rule 703(c), NYFE Guide ¶ 5005, at 5012 (Sept. 2002) (compare NYBOT Rule 5.03(e)-(g)).

c. "Settlement prices" of futures contracts are used to assess the value of FCM and customer positions at particular points in time, and thus to determine whether additional margin payments are required. See *Lessons Learned* 8; *Norman Eisler*, CFTC Docket No. 01-14, 2004 WL 77924, at *2 (Jan. 20, 2004) (*Eisler*). The process of establishing settlement prices varies among exchanges and clearinghouses but, in the "open outcry" environment, it typically involves the use of a "settlement committee" or "pit committee." See *Lessons Learned* 8. At the time of the events at issue in this case,

tion, and First West's corrected margin deficit was determined to be approximately $4.5 million. J.A. 21, 22, 24-25 (Compl. ¶¶ 80, 84, 96-101); Pet. App. 4a-5a, 19a-20a.

Petitioner was directly liable to the NYCC for the losses incurred as a result of the trades that it had carried at the behest of Eisler and First West (see p. 6, *supra*), but petitioner had insufficient funds to discharge that obligation. See J.A. 25 (Compl. ¶¶ 102-105); Pet. App. 5a, 21a. When petitioner defaulted on that payment obligation, NYBOT and NYCC suspended petitioner's memberships. J.A. 26 (Compl. ¶ 107); Pet. App. 5a. To obtain satisfaction of petitioner's financial obligations resulting from the P-Tech futures and options trades cleared by petitioner, NYBOT and NYCC liquidated the assets in petitioner's segregated customer account, which included funds belonging to *all* of petitioner's customers. *Id.* at 21a.[9] Petitioner's business subsequently collapsed. *Id.* at 5a.

4. In July 2000, petitioner filed suit against various entities and individuals, including respondents NYBOT, NYCC, NYFE, and NYCE as well as Eisler and First West. See J.A. 9-57 (complaint).[10] Petitioner invoked, *inter alia*, the express

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[9] NYBOT subsequently entered into a settlement under which it purchased the claims of petitioner's customers other than First West at full value, thereby protecting those customers from any financial loss as a result of petitioner's default. See J.A. 80-81; Pet. App. 28a & n.13. Respondents NYBOT and NYCC, as subrogees to petitioner's customers, have pursued those claims against petitioner. *Id.* at 28a-29a. The district court denied respondents' motion for judgment on the pleadings, see *id.* at 27a-33a, and the claims remain pending.

[10] On July 11, 2001, while petitioner's suit was pending in the district court, the CFTC issued an administrative order finding that, "[f]rom at least August 1999 to May 12, 2000, the NYFE * * * failed to enforce its rule for determining settlement prices for P-Tech Options." *N.Y. Futures Exch.*, 2001 WL 777042, at *1. The CFTC explained that the Settlement Committee of the NYFE had "failed to use any of the methods set forth in NYFE Rule 315(a-c)" to establish

private right of action contained in 7 U.S.C. 25(a)-(b) (1994). At the time of the events giving rise to this suit, 7 U.S.C. 25(a)(1)(A)-(D) (1994) identified four categories of plaintiffs who could file suit for damages against a defendant "other than a contract market, clearing organization of a contract market, licensed board of trade, or registered futures association." 7 U.S.C. 25(a)(1) (1994). The potential plaintiffs identified by Section 25(a) included persons who had "purchased" or "sold" an option or futures contract. 7 U.S.C. 25(a)(1)(C) and (D) (1994).

Section 25(b)(1) of Title 7 provided that, under certain circumstances involving improper failures to enforce or comply with applicable bylaws, rules, or regulations, a contract market, clearing organization, or licensed board of trade could be held "liable for actual damages sustained by a person who engaged in any transaction on or subject to the rules of such contract market or licensed board of trade." 7 U.S.C. 25(b)(1) (1994). A person bringing such an action must establish that the contract market, clearing organization, or licensed board of trade acted in bad faith. 7 U.S.C. 25(b)(4) (1994).

The gravamen of petitioner's claims against respondents was that those defendants, acting in bad faith, had failed adequately to monitor and supervise the process by which settlement prices for P-tech futures and options were calculated. See J.A. 29, 37-38, 41 (Compl. ¶¶ 119-120, 147-150, 164, 166).

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settlement prices for P-Tech futures and options, and that the committee had not complied with NYFE Rule 315(d)'s requirement that any alternative methodology be supported by a written explanation. *Id.* at *2. The CFTC further found that the NYFE's failure to enforce Rule 315 violated statutory and regulatory provisions requiring each contract market to enforce its own rules. See *ibid.* (citing 7 U.S.C. 7a(a)(8) (1994); 17 C.F.R. 1.51(a), 1.53 (2000)). The CFTC imposed a civil penalty of $75,000. *N.Y. Futures Exch.*, 2001 WL 777042, at *1. The NYFE consented to entry of the order but neither admitted nor denied the CFTC's findings. See *id.* at *1; see also note 8, *supra* (describing CFTC administrative enforcement action against Eisler and First West).

NYFE Rule 315 specified the procedures to be used in calculating settlement prices for positions on that exchange. See NYFE Rule 315, NYFE Guide ¶ 2541, at 2522 (Apr. 2002) (compare NYBOT Rule 4.28).

3. In early May 2000, First West Trading, Inc. (First West) incurred significant losses in Pacific Stock Exchange Technology Index futures and options contracts (P-Tech futures and options) traded on the NYFE. Pet. App. 3a, 17a-18a. Norman Eisler, the principal of First West and the Chairman of the NYFE, directed the underlying trades. See *ibid.* Petitioner's complaint in this case alleged that Eisler's trading decisions were made "without input, counsel, advice or any type of recommendation whatsoever from [petitioner]." J.A. 17 (Compl. ¶ 56).

Because Eisler was a registered floor broker (see 7 U.S.C. 1a(16) and 6e; 17 C.F.R. 3.11) and a member of the NYFE, *Eisler*, 2004 WL 77924, at *1, he was entitled to execute trades on behalf of First West on the floor of the exchange. Under the NYFE's rules, however, Eisler could exercise floor trading privileges only if he was guaranteed by a "clearing member" that agreed to accept for clearance any trades effected by Eisler. See NYFE Rules 116(a)(i), 118(a)(i), NYFE Guide ¶¶ 2221, 2231, at 2107, 2109 (Sept. 2000) (compare NYBOT Rules 2.16(a)(i) and 2.18(a)(i)). Petitioner served as Eisler's clearing FCM, thereby assuming direct liability to the clearinghouse for Eisler's trades and playing an essential role as a participant in consummating those trades. See Pet. App. 3a, 17a-18a; NYFE Rule 306(i)(2), NYFE Guide ¶ 2523, at 2517 (Apr. 2002).[7]

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[7] Under NYFE Rule 306(i)(2), NYFE Guide ¶ 2523, at 2517 (Apr. 2002), every contract made on the Exchange "by a trading member shall be made on behalf of a clearing member who shall be the buyer or seller of said contract on the terms set forth therein." Rule 306(i)(2) further required that "[t]he clearing member shall assume such contract in writing within one hour after receipt of

Eisler was also a member of the NYFE's Settlement Committee for P-Tech futures and options. Pet. App. 3a. The Settlement Committee calculated P-Tech contract prices for the purpose of setting margin requirements for customer accounts. *Ibid.* According to petitioner's allegations in the instant suit, Eisler used his authority on the Settlement Committee to set the P-Tech settlement prices at levels that caused First West's positions initially to appear more favorable than they actually were. See J.A. 18 (Compl. ¶ 60); Pet. App. 4a, 19a.[*] Petitioner further alleged that "[t]he incorrect information regarding the settlement price was disseminated by NYBOT and was used by [petitioner] to calculate margin requirements applicable to First West's account," and that "[t]his miscalculation of the P-Tech Settlement Price * * * caused the margin calculations for First West's account to be incorrect." J.A. 18 (Compl. ¶¶ 61, 62); see Pet. App. 4a, 19a.

On May 12, 2000, Eisler notified petitioner that First West was unable to meet a call for additional margin, which at that time was calculated to be approximately $700,000. Shortly thereafter, Eisler was removed from the Settlement Committee. On May 15, 2000, the Settlement Committee recalculated P-Tech futures and options prices without Eisler's participa-

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a report from the trading member identifying the terms thereof." Thus, as a result of its agreement to serve as Eisler's clearing member, petitioner was treated as "the buyer or seller" of each of Eisler's contracts and was obligated to assume those contracts.

[*] On July 11, 2001, the CFTC filed an administrative enforcement action against Eisler and First West, charging them with manipulation in violation of 7 U.S.C. 9 and 13b (1994), 17 C.F.R. 33.9(d), and with making false reports in violation of 7 U.S.C. 13(a)(4) (1994). See *Eisler*, 2004 WL 77924, at *1. On January 20, 2004, the Commission entered an order finding that Eisler and First West had violated the CEA and Commission regulations, and requiring, *inter alia*, that Eisler and First West pay a civil penalty of up to $4,923,000. See *id.* at *8. Eisler and First West consented to entry of the order but neither admitted nor denied the CFTC's findings. See *id.* at *1.

Petitioner further alleged that "[t]he incorrect settlement prices caused the margin computation to skew, thereby creating a perception of lower margin risk to FCMs and potential financial disaster to FCMs, who could not anticipate or prepare for the drastic change in P-Tech Settlement Price of the P-Tech Futures and options when the error was corrected." J.A. 30 (Compl. ¶ 121); cf. *Lessons Learned* 15 ("If the settlement price does not accurately reflect the market price at the time of settlement, the potential loss may be greater than one day's price movement.").

The district court dismissed petitioner's federal claims against all defendants, holding that petitioner was not a proper plaintiff under the terms of 7 U.S.C. 25. Pet. App. 23a-26a. The court found that petitioner "lack[ed] standing under" Section 25 because petitioner did "not allege that it was either a purchaser or a seller of P-Tech Futures and Options" and did "not claim that it traded for its own account." *Id.* at 24a. In light of its dismissal of petitioner's federal claims, the district court declined to exercise supplemental jurisdiction over the state-law claims and accordingly dismissed the suit in its entirety. *Id.* at 26a-27a.

5. The court of appeals affirmed. Pet. App. 1a-15a. The court held that petitioner did "not fall within any of the required subdivisions of" 7 U.S.C. 25(a)(1)(A)-(D) because petitioner "functioned merely as a broker or agent" rather than as a buyer or seller of P-Tech contracts. Pet. App. 9a. The court of appeals further held that petitioner was not a proper plaintiff under 7 U.S.C. 25(b). The court explained that the remedies provided by Section 25(b) "are expressly available only to a private litigant who 'engaged in any transaction on or subject to the rules' of contract markets or other registered entities." Pet. App. 11a (quoting 7 U.S.C. 25(b)(1)). The court also observed that petitioner "was not an owner of P-Tech contracts traded by First West" and "did not fall within

any of the categories enumerated in" Section 25(a)(1)(A)-(D). *Ibid.*

Petitioner contended that it was a proper plaintiff under the CEA "because it faced essentially the same risks as a purchaser or seller of commodities contracts." Pet. App. 12a. In rejecting that argument, the court of appeals held that, because petitioner "was not a trader of P-Tech contracts" and "did not own the P-Tech contracts at issue," the pecuniary injury that petitioner suffered "was a credit loss, not a trading loss." *Ibid.* The court concluded that petitioner "lack[ed] standing because it was not 'engaged in any transaction on or subject to the rules' of a contract market and did not suffer any 'actual losses that resulted from such transaction.'" *Id.* at 13a (quoting 7 U.S.C. 25(b)(1)).[11]

SUMMARY OF ARGUMENT

A. For purposes of determining whether petitioner is a proper plaintiff under 7 U.S.C. 25(b)(1) (1994), it is irrelevant whether petitioner falls within any of the categories set forth in Section 25(a)(1)(A)-(D). At the time of the transactions at issue here, Section 25(a)(1)(A)-(D) applied by its terms to suits against persons *other than* contract markets, boards of trade, clearing organizations, and futures associations. The respondents in this Court are two contract markets, a board of trade, and a clearing organization. Petitioner's claims against respondents therefore are governed not by Section 25(a)(1)(A)-(D) but by Section 25(b)(1), which rendered such entities liable to suit by persons who had "engaged in any transaction on or subject to the rules of [a] contract market or licensed board of trade." 7 U.S.C. 25(b)(1) (1994). Section 25(b)(1) does not cross-reference Section 25(a)(1)(A)-(D) or

[11] The court of appeals also held that the district court had not abused its discretion in declining to exercise supplemental jurisdiction over petitioner's state-law claims. Pet. App. 13a-15a.

otherwise suggest that a person who "engaged in" a covered transaction must also satisfy Section 25(a)(1)(A)-(D)'s requirements.

B. In both a practical and a legal sense, petitioner "engaged in" (*i.e.*, carried on or participated in) transactions subject to the rules of a contract market or licensed board of trade. Under the governing rules, Eisler's trades were made on behalf of petitioner, who (prior to clearance) was deemed by those rules to be the buyer or seller obligated to the other party to the trade. Eisler was allowed to execute trades on the floor of the NYFE only because petitioner had agreed to clear those trades. The transactions were clearly subject to the NYFE Rules, and petitioner's agreement to clear those trades and to accept full responsibility to the NYCC for any resulting losses was essential to the consummation of the relevant trades. Under the rules of the NYCC and the NYFE, moreover, the ultimate legal effect of the clearing process was to create a contract between petitioner and the clearinghouse. Although First West had separate contractual rights and obligations vis-a-vis petitioner, First West was not in privity of contract with the NYCC, the clearing FCM on the other side of the transaction, or the other FCM's customer. And under the contracts with the NYCC that resulted from petitioner's clearance of Eisler's trades, petitioner was directly liable to the clearinghouse for any decline in the value of First West's positions.

Thus, petitioner (1) served as principal obligor for the trades that Eisler executed on the floor of the Exchange, (2) played an indispensable role in the consummation of the overall trading transactions, (3) entered into a direct contractual relationship with the clearinghouse as part of those transactions, and (4) was liable to the clearinghouse for the decline in value of First West's positions. Each factor is a reflection of the rules of the NYFE or the NYCC that govern these trades.

And those factors taken together indicate that petitioner "engaged in" the transactions at issue in this case.

C. As noted, the "transaction[s]" in which petitioner "engaged"—*i.e.*, the trades that petitioner cleared on First West's behalf—were "on or subject to the rules of [a] contract market or licensed board of trade." 7 U.S.C. 25(b)(1) (1994). In 1983, when Section 25 was enacted into law, a CFTC regulation applicable to "[c]ontract market rules" (17 C.F.R. 1.41 (1982)) provided that, for purposes of the regulation, the term "contract market" would encompass "a clearing organization that clears trades for the contract market." 17 C.F.R. 1.41(a)(3) (1982). Congress's use of the phrase "rules of [a] contract market" should be construed in a manner consistent with that established understanding. Thus, the undisputed fact that petitioner's clearance of trades was subject to the rules of the NYCC is a sufficient basis for finding this statutory prerequisite to be satisfied.

The transactions at issue here were also subject to the rules of the NYFE. The NYFE Rules made Eisler's exercise of floor trading privileges contingent on petitioner's agreement to clear Eisler's trades. Those rules also required petitioner to assume the contractual obligations that Eisler's trades entailed, and they provided that petitioner was deemed to be the responsible buyer or seller on whose behalf those trades were made. In addition, the NYFE Rules governed the calculation of settlement prices, which were used to determine whether petitioner would be required to post additional margin or would instead collect gains from the NYCC. The applicability of the NYFE Rules makes it clear that the "transaction[s]" in which petitioner "engaged" were "on or subject to the rules of [a] contract market."

D. Allowing petitioner's suit to go forward is consistent with the history and purposes of Congress's decision to limit Section 25(b)(1)'s private right of action to plaintiffs who have

"engaged in" regulated commodity transactions on a futures exchange. The legislative history indicates that Congress sought to avoid speculative claims brought by persons who have not themselves participated in any transactions on a commodity market. The instant suit does not implicate that concern, because petitioner has alleged a financial loss resulting directly from its clearance of identified trades on the NYFE. And because the NYCC itself determined that petitioner's margin account deficit was approximately $4.5 million, petitioner's claim of pecuniary injury cannot be dismissed as speculative.

ARGUMENT

PETITIONER IS A PROPER PLAINTIFF UNDER 7 U.S.C. 25(b)(1)

A. A Plaintiff Need Not Satisfy The Requirements Of 7 U.S.C. 25(a) In Order To File Suit Under 7 U.S.C. 25(b)(1)

In holding that petitioner was not "'engaged in any transaction on or subject to the rules' of contract markets or other registered entities," and therefore was not a proper plaintiff under 7 U.S.C. 25(b)(1), the court of appeals relied in part on its antecedent determination that petitioner "did not fall within any of the categories enumerated in" 7 U.S.C. 25(a)(1)(A)-(D). Pet. App. 11a (quoting 7 U.S.C. 25(b)(1)); see *id.* at 9a-10a. That mode of analysis was misconceived. Section 25(a) and Section 25(b)(1) govern suits against different (and, indeed, mutually exclusive) classes of defendants, and they establish different tests for determining which plaintiffs may sue. Petitioner therefore did not need to satisfy the requirements of Section 25(a) in order to sue under Section 25(b)(1).

At the time of the events that gave rise to petitioner's current claims, Section 25(a)(1)(A)-(D) identified the plaintiffs to whom persons "*other than* a contract market, clearing organization of a contract market, licensed board of trade, or registered futures association" could be held liable under the CEA. 7 U.S.C. 25(a)(1) (1994) (emphasis added). Respondents NYFE, NYCE, NYCC, and NYBOT were two contract markets, a clearing organization, and a board of trade respectively. Section 25(a)(1)(A)-(D) is thus inapplicable by its terms to the determination of respondents' potential liability.

The liability of contract markets, clearing organizations, and boards of trade is addressed not in Section 25(a) but in Section 25(b)(1). Section 25(b)(1) identifies the types of wrongdoing (*e.g.*, a "fail[ure] to enforce any bylaw, rule, regulation, or resolution that [the defendant] is required to enforce") that may subject such entities to liability. See 7 U.S.C. 25(b)(1)(A) (1994). In addition, by stating that such entities "shall be liable for actual damages sustained *by a person who engaged in any transaction on or subject to the rules of such contract market or licensed board of trade*," 7 U.S.C. 25(b)(1) (1994) (emphasis added), Section 25(b)(1) identifies the class of plaintiffs who may invoke the statutory right of action against contract markets, clearing organizations, and boards of trade.

In defining the potential liability of entities like respondents, Section 25(b)(1)(A) does not reference Section 25(a) or otherwise suggest that a plaintiff who sues such an entity must fall within one of the categories defined in Section 25(a)(1)(A)-(D). The absence of any such reference is particularly telling because Section 25(b)(2) and Section 25(b)(3) *do* contain cross-references to "subsection (a) of this section." 7 U.S.C. 25(b)(2) and (3) (1994). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). Importing the limitations of Section 25(a)(1)(A)-(D) into Section 25(b)(1)(A) not only reads into Section 25(b)(1)(A) language that simply is not there, but also simultaneously renders superfluous the cross-references in Section 25(b)(2) and (3) that actually are in the statutory text. The structure of Section 25 as a whole thus belies any inference that a plaintiff who files suit under Section 25(b)(1) must fall within one of the categories defined by Section 25(a)(1)(A)-(D).

Undoubtedly there is a substantial *overlap* between the categories of potential plaintiffs under the two subsections. In particular, a person who "purchased" or "sold" a futures or option contract, see 7 U.S.C. 25(a)(1)(C) and (D) (1994), would be an obvious example of a person who "engaged in [a] transaction on or subject to the rules of [a] contract market or licensed board of trade," 7 U.S.C. 25(b)(1) (1994). But if the language of Section 25(b)(1) is otherwise properly construed to encompass FCMs that clear their customers' accounts, Section 25(a)'s use of the terms "purchased" and "sold" provides no basis for adopting a narrower reading. To the contrary, Congress's use of distinct terminology in the two subsections suggests that Section 25(b)(1)'s phrase "engaged in [a] transaction," without the limiting language "specified in subsection (a)" (which does appear in the next two subsections), does not incorporate the limitations imposed by Section 25(a)(1)(A)-(D). *Russello*, 464 U.S. at 23.

B. In Its Role As Clearing FCM For First West's Trades, Petitioner "Engaged In" Regulated Commodity Transactions Within The Meaning Of 7 U.S.C. 25(b)(1)(A) (1994)

The phrase "engage in" is properly understood to mean, *inter alia*, "to begin and carry on an enterprise, esp. a business or profession," and "to take part: PARTICIPATE." *Webster's Third New International Dictionary* 751 (1963). In concluding that petitioner was not a proper plaintiff under 7 U.S.C. 25(b)(1)(A), the court of appeals stated that petitioner "functioned merely as a broker or agent that earned commissions for handling its customers['] trades." Pet. App. 9a. That characterization reflects a misunderstanding both of the role that a clearing FCM plays in effecting commodity transactions and of the legal obligations that a clearing FCM assumes. The NYFE and NYCC Rules that governed the transactions at issue here specifically addressed petitioner's role and responsibilities. Those rules specified that petitioner (1) served as principal obligor for Eisler's trades on the floor of the exchange, (2) played an essential role in the consummation of First West's transactions, (3) entered into a direct contractual relationship with the NYCC as part of those transactions, and (4) was financially liable to the clearinghouse for the decline in value of First West's positions. Those factors taken together identify petitioner as an entity that "engaged in" the relevant transactions. Indeed, the fact that the rules regulated petitioner's role in the transactions makes clear that petitioner engaged in transactions subject to the relevant rules.

1. Under the applicable NYFE Rule, every trade made by Eisler for First West's account was deemed to be "made *on behalf of*" petitioner as clearing member, and petitioner was treated as "the *buyer or seller of said contract* on the terms set forth therein." NYFE Rule 306(i)(2), NYFE Guide ¶ 2523.

at 2517 (Apr. 2002) (emphases added). That rule is in keeping with general custom in the industry: The initial buy-sell agreement that is formed on the floor of the exchange (*i.e.*, before the clearinghouse's assumption of obligations as part of the clearing process) is a trade *between FCMs*. Cf. NYBOT Rule 4.03(c) (floor trade initially constitutes binding oral contract "between the [Exchange] Members"). Petitioner thus directly "engaged in" the First West trades that allegedly caused its losses, because those trades were entered into "on behalf of" petitioner, who was treated as "buyer or seller."

2. Although Eisler was a licensed floor broker and a member of the NYFE, his eligibility to exercise floor trading privileges on the exchange depended by virtue of the NYFE Rules on the willingness of an NYCC clearing member to act as guarantor. NYFE Rule 118(a)(i), NYFE Guide ¶ 2231, at 2109 (Sept. 2000); see NYFE Rule 9, NYFE Guide ¶ 2017, at 2012 (Sept. 2000) (definition of "clearing member"); NYFE Rule 114, NYFE Guide ¶ 2211, at 2105 (Sept. 2000) (application and qualification of clearing members). To serve as Eisler's guarantor, petitioner agreed, *inter alia*, "to accept for clearance any transactions effected by the guaranteed member [Eisler] on or subject to the Rules of the [NYFE]." NYFE Rule 116(a)(i), NYFE Guide ¶ 2221, at 2107 (Sept. 2000). The NYFE Rules further required petitioner, as Eisler's clearing member, to "assume [each] contract in writing within one hour after receipt of a report from the trading member [*i.e.*, Eisler] identifying the terms thereof." NYFE Rule 306(i)(2), NYFE Guide ¶ 2523, at 2517 (Apr. 2002). Petitioner's essential practical role in effectuating Eisler's trades, as mandated by the NYFE Rules, further bolsters the conclusion that petitioner "engaged in" transactions subject to such rules.

3. Petitioner's service as clearing FCM for Eisler's trades also entailed the creation of a direct contractual relationship between petitioner and the NYCC rendering petitioner liable

for trading losses incurred as a result of the subject transactions. In keeping with industry custom and practice, the current ICE Clear US Rules (successor to the NYCC Rules that governed in May 2000, see note 5, *supra*) state that the clearinghouse, "by accepting a Contract offered to it for clearance by or on behalf of a Clearing Member," assumes each clearing FCM's obligations to the other party to the trade and in turn "succeed[s] to and become[s] vested with all rights and benefits accruing therefrom." ICE Clear US Rule 401(a); see generally 1982 Senate Report 188.

Those rules further explain that the liabilities and obligations of the clearinghouse "shall extend only to clearing members," and that the clearinghouse "shall not have any liability or obligation arising out of or with respect to any contract to any customer of a clearing member." ICE Clear US Rule 401(b)(i). The current rules of ICE Clear US are not aberrational, but rather accord with the CFTC's long understanding that "clearing organizations * * * generally have as their direct customers FCMs, not the ultimate 'customers' who entered into the futures contracts and options positions for which the [FCM's] margin funds were posted." 50 Fed. Reg. at 36,050; see pp. 6-7, *supra*. Thus, as Judge Friendly explained in a characteristically apt observation, clearing FCMs like petitioner are treated "as principals in trading transactions." *Leist*, 638 F.2d at 287. The fact that, under the relevant rules, each of Eisler's trades produced a contractual relationship between petitioner and the NYCC reinforces the conclusion that petitioner "engaged in" transactions subject to such rules.

4. As a result of the contractual commitments to the NYCC that petitioner's performance of clearing functions entailed, the NYCC Rules made petitioner liable to the clearinghouse for aggregate losses sustained in its customers' posi-

tions. See J.A. 173 (NYCC Rule 504(a)(i)).[12] The rules of the clearinghouse further provide that a clearing FCM is in "[d]efault," and subject to suspension as a clearing member, if, *inter alia*, it "fails to meet any of its obligations under its Contracts with the [clearinghouse]." J.A. 188 (NYCC Rule 801(a)). Indeed, in the instant case the NYBOT and the NYCC seized the entirety of petitioner's customer account—including funds attributable to customers other than First West—in an effort to enforce petitioner's obligation to make good on trades that it had cleared on behalf of First West. See Pet. App. 21a; p. 11, *supra*.

Petitioner's assumption of the financial risk entailed by Eisler's trades further supports the conclusion that petitioner "engaged in" the relevant transactions. The court of appeals stated that, "regardless of whether the First West trading position rose or declined in value, [petitioner] had no interest in any of the resulting profits or investment[] losses." Pet. App. 12a. The court concluded on that basis that "[petitioner's] loss was a credit loss, not a trading loss." *Ibid.* Those statements are erroneous.

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[12] By the same token, petitioner was entitled to payment from the clearinghouse for any trading day on which its customers' aggregate positions gained value. See J.A. 173-174 (NYCC Rule 504(a)(ii)). Respondents contend (Br. in Opp 10 n.5) that a clearing FCM is properly characterized "as an agent for undisclosed principals," and that "[t]he contract and the rights thereunder belong to the principal, not the agent." Respondents are mistaken. It is true that, pursuant to First West's separate contract with petitioner, petitioner would have been required to pay First West any financial gains that the trades executed by Eisler might have produced. The existence of that separate contractual undertaking, however, should not obscure the fact that the NYCC's own contractual rights and obligations were exclusively to petitioner, not to Eisler or First West. See ICE Clear US Rule 401(b)(i) (clearinghouse obligations extend only to clearing members, and the clearinghouse shall not have any obligations to customers of clearing members).

To be sure, if First West had promptly posted the required additional margin after the true extent of its losses became known, petitioner could have discharged its own obligation to the NYCC and thereby avoided any serious practical harm to itself from the decline in value of First West's positions. But even if petitioner's pecuniary injury was *in part* a "credit loss," it was a "trading loss" *as well*. By acting as clearing FCM for First West's trades, petitioner assumed a direct contractual obligation to pay the NYCC for any losses that First West's positions sustained. The existence and enforceability of that obligation arose directly from petitioner's role in the clearing process and were independent of First West's separate duty to reimburse petitioner for losses suffered on account of the trades.

The fact that petitioner's financial loss may have had more than one cause is scarcely anomalous. If property is damaged by fire, for example, and the owner's insurance company wrongly refuses to pay the resulting claim, both the fire itself and the insurer's conduct may properly be regarded as causes of the owner's ultimate financial loss. Similarly here, petitioner incurred substantial liability to the NYCC by acting as clearing FCM for futures and option positions that later declined in value. Petitioner's legal duty to pay more than $4 million to the NYCC on account of those transactions is properly characterized as a "trading loss," see Pet. App. 12a, even though petitioner's injury is *also* attributable to First West's failure to satisfy its own margin obligations.[13]

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[13] The effectuation of each of Eisler's trades involved a series of subsidiary steps—*e.g.*, the execution of the trade by Eisler on the floor of the NYFE "on behalf of" petitioner as clearing FCM, NYFE Rule 306(b)(2), NYFE Guide ¶ 2523, at 2517 (Apr. 2002); the "assum[ption]" of the trade by petitioner as clearing FCM, *ibid.*; and the clearance of the trade through the clearinghouse, whereby the clearing FCMs' obligations to each other were replaced by reciprocal obligations running between each FCM and the NYCC. Those subsidiary steps for each trade are properly viewed as components of a single

C. The Transactions In Which Petitioner Engaged Were "On Or Subject To The Rules" Of Both The NYCC And The NYFE

At the time of the events that are alleged to give rise to liability in this case, Section 25(b)(1) of Title 7 identified as a potential plaintiff any "person who engaged in any transaction *on or subject to the rules of [a] contract market or licensed board of trade*." 7 U.S.C. 25(b)(1)(A) (1994) (emphasis added). The transactions at issue here satisfied the italicized condition because, as already noted, those transactions were subject to the rules of both the NYCC and the NYFE. Indeed, the fact that petitioner's own role in the transactions was pervasively addressed by the NYCC and NYFE Rules underscores that petitioner was a key participant, *i.e.*, "engaged in" the transactions.

1. Respondents acknowledge that, "[a]s a clearing broker, Petitioner dealt with the clearinghouse NYCC and cleared customer trades, subject to NYCC's rules." Br. in Opp. 14. Respondents contend, however, that, under the version of Section 25(b)(1) that was in effect in May 2000, coverage of the relevant transactions by the rules of the NYCC was insufficient to trigger the private right of action. See *ibid.* The thrust of respondents' argument is that the reference in former Section 25(b)(1) to "rules of [a] contract market or licensed board of trade" did not encompass rules of a clearing organization. That contention lacks merit.[14]

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overall "transaction" within the meaning of Section 25(b)(1). Alternatively, treating each subsidiary step as a distinct Section 25(b)(1) "transaction," petitioner "engaged in" each of those steps and is accordingly a proper plaintiff in this case.

[14] It is undisputed that a person who "engaged in" a transaction subject to the rules of a clearinghouse such as the NYCC or ICE Clear US would be a proper plaintiff under current 7 U.S.C. 25(b)(1). See Br. in Opp. 21-22; note 1, *supra*.

When Congress amended the CEA to create an express private right of action (see p. 2, *supra*), a CFTC regulation addressing "[c]ontract market rules" (17 C.F.R. 1.41 (1982)) provided that, for purposes of the regulation, "[t]he term 'contract market' includes a clearing organization that clears trades for the contract market." 17 C.F.R. 1.41(a)(3) (1982) (repealed 2001). When it promulgated that rule in 1976, the CFTC explained that for these purposes, "a meaningful distinction cannot be drawn between the rules of the clearing organization and those of the contract market." 41 Fed. Reg. 40,093. The reference to "rules of [a] contract market or licensed board of trade" in 7 U.S.C. 25(b)(1) (1994) is properly construed to incorporate that understanding. See, *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988) (Court "generally presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts"); cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (Congress is ordinarily presumed to be aware of an administrative or judicial interpretation of a statute, and to approve that interpretation when it re-enacts a law or incorporates existing statutory language into a new enactment).

2. In any event, even if respondents' argument concerning the NYCC Rules were correct, petitioner would still be a proper plaintiff because the "transaction[s]" in which petitioner "engaged" were subject not only to the rules of the NYCC, but also to the rules of the NYFE, a "contract market" within the meaning of the CEA. Those rules included NYFE Rule 306(i)(2), NYFE Guide ¶ 2523, at 2517 (Apr. 2002), which provided that "[e]very contract made on the Exchange shall be assumed by a" clearing member of the Exchange (*i.e.*, petitioner) and "shall be made on behalf of a clearing member who shall be the buyer or seller of said contract." See p. 20, *supra*. In addition, NYFE Rule 315, NYFE Guide ¶ 2541, at 2522 (Apr. 2002), governed the computation

of settlement prices and thus ultimately controlled the amounts of margin that petitioner was required to post. See pp. 8-9, *supra*. The transactions were also subject to NYFE Rules 116 and 118, NYFE Guide ¶¶ 2221, 2231, at 2107, 2109 (Sept. 2000), under which petitioner's agreement to act as clearing member was a prerequisite to Eisler's exercise of floor trading privileges. See p. 21, *supra*.

In arguing that petitioner's performance of its clearing responsibilities did not involve transactions "on or subject to the rules of [a] contract market," respondents appear to treat the clearing process as a self-contained transaction, exclusively within the domain of the NYCC, that was wholly separate and severable from the underlying trades by First West. See Br. in Opp. 14-16. That characterization is mistaken. Under the rules of the NYFE, the clearance of trades was an integral part of the overall process by which the trading decisions of persons (like Eisler and First West) other than clearing FCMs were put into effect. That is particularly apparent from NYFE Rules 116 and 118, NYFE Guide ¶¶ 2221, 2231, at 2107, 2109 (Sept. 2000), which conditioned Eisler's very ability to trade on access (through a clearing FCM) to the clearing process.

Thus, petitioner as clearing FCM was directly and substantially involved in the effectuation of the underlying trades. Those larger transactions were clearly "on [and] subject to" the rules of the NYFE, 7 U.S.C. 25(b)(1), even though the details of the clearing process were governed by the rules of the NYCC. Even if the reference in 7 U.S.C. 25(b)(1) (1994) to "rules of [a] contract market" did not encompass the rules of the NYCC, petitioner therefore would still be a proper plaintiff in this case.

D. Petitioner's Invocation Of The CEA's Private Right Of Action Is Consistent With The History And Purposes Of Section 25(b)(1)

The CEA was amended in 1983 to create an express private right of action against, *inter alia*, a contract market, clearing organization, or board of trade. The House Report that accompanied the 1983 CEA amendments stated that "[t]he cause of action [against those defendants] would be restricted to cases where the plaintiff had engaged in a regulated commodity transaction." H.R. Rep. No. 565, 97th Cong., 2d Sess. Pt. 1, at 57 (1982) (1982 House Report). The 1982 House Report explained that the Committee intended "to avoid suits for speculative damages to assets that are affected by fluctuations in prices on the commodity market but which are not the subject of transactions on such market." *Ibid.*

The 1982 House Report's description of the persons who may invoke Section 25(b)(1)'s private right of action (*i.e.*, persons who have "engaged in a regulated commodity transaction," 1982 House Report 57) tracked the language of the enacted law and did not further specify the categories of plaintiffs who may file suit.[15] Petitioner's current suit, however, is

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[15] Respondents rely (Br. in Opp. 19-20) on the "Additional Views" stated in 1982 by Representative Glickman, who urged that the CEA be amended to make explicit that "commodity investors who suffer actual damages [have] the right to sue both brokers and exchanges for violations of the [CEA]." 1982 House Report 239. In urging Congress to eliminate any perceived ambiguity as to whether "commodity investors" may sue, however, Representative Glickman did not purport to define the precise scope of the new express private right of action. That is particularly clear because Representative Glickman's reference to commodity investors' "right to sue both brokers and exchanges" encompassed both Section 25(a) (which governs suits against brokers) and Section 25(b)(1) (which governs suits against exchanges). Representative Glickman's capsule description of the new express private right of action therefore cannot reasonably be understood as a gloss on the phrase "engaged in any

fully consistent with the stated rationale for limiting the right of action under Section 25(b)(1) to plaintiffs who have engaged in transactions on a commodity market. The gravamen of petitioner's suit is that, as a clearing FCM, it assumed direct financial responsibility for specific trades, without receiving adequate margin from First West and without an accurate understanding of the risks that the transactions entailed, because the relevant NYFE committee, knowingly and in bad faith, miscalculated settlement prices for P-tech futures and options. See J.A. 30 (Compl. ¶¶ 121-124). Petitioner's alleged losses thus resulted from its own direct participation in specific transactions that indisputably occurred on a futures exchange. And petitioner's claim of pecuniary injury is not speculative, because the NYCC itself determined, based on revised settlement prices computed without Eisler's participation, that petitioner's margin deficit was approximately $4.5 million. See Pet. App. 5a, 19a-20a.[16]

Petitioner alleges that it participated in actual commodity-market transactions, that it assumed contractual obligations as a result of those trades, that the positions it was carrying declined in value, and that it suffered pecuniary harm as a result. Allowing suits like petitioner's to go forward is fully consistent with the history and purposes of Section 25(b)(1), and will further the goals of the Commodity Exchange Act by providing an appropriate level of deterrence of future violations.

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transaction," which appears in the latter provision but not in the former. See pp. 17-19, *supra*.

[16] Petitioner's complaint alleged total damages in excess of $25 million, based in part on the collapse of petitioner's business and the damage to its reputation. See, *e.g.*, J.A. 39 (Compl. ¶¶ 156-157). This case presents no occasion for the Court to determine the precise scope of the "actual losses that resulted from such transaction" that may be recovered by a plaintiff who satisfies the requirements of Section 25(b)(1).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

THOMAS G. HUNGAR
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

TERRY ARBIT
Acting General Counsel

BRADFORD BERRY
Deputy General Counsel

HAROLD HARDMAN
Senior Assistant General Counsel

GLORIA CLEMENT
Assistant General Counsel
Commodity Futures Trading Commission
Washington, D.C. 20561

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